

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION



UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney  
General Hubert H. Humphrey, III,  
its Department of Health, and its  
Pollution Control Agency

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORTATION;  
HOUSING AND REDEVELOPMENT AUTHORITY  
OF ST. LOUIS PARK; OAK PARK VILLAGE  
ASSOCIATES; RUSTIC OAKS CONDOMINIUM,  
INC.; and PHILIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION;

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

STATEMENT OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION OF  
THE UNITED STATES AND  
THE STATE OF MINNESOTA  
FOR AN ORDER DENYING  
REILLY TAR AND  
CHEMICAL CORPORATION'S  
DEMAND FOR A JURY  
TRIAL AS UNTIMELY

I. INTRODUCTION

This action concerns soil and ground water contamination attributed to Defendant Reilly Tar & Chemical Corporation's operation of a coal tar refining and wood treating plant in St. Louis Park, Minnesota, from 1917 until 1972. On October 1, 1982, Defendant Reilly Tar served a demand for a jury trial on the issues raised in this action. This motion is brought by the United States and the State of Minnesota for an order denying that demand for a jury trial as untimely under Fed. R. Civ. P. 38(b). 1/

II. FACTS

The facts relevant to this motion are (1) the dates certain

---

1/ Including this motion, a total of four motions, brought by Plaintiffs, have been scheduled to be heard by Magistrate Boline on May 4, 1983. These motions are as follows: (1) Motion brought by the State of Minnesota and the United States for Order Denying Reilly Tar and Chemical Corporation's Demand for a Jury Trial as Untimely. [This is the motion discussed in this memorandum]; (2) Motion brought by the United States to Quash Reilly Tar and Chemical Corporation's Demand for A Jury Trial; (3) Motion brought by the State of Minnesota for Summary Judgment as to Reilly Tar and Chemical Corporation's First Affirmative Defense; and, (4) Motion brought by the United States for Judgment on the Pleadings as to Reilly Tar and Chemical Corporation's First and Second Affirmative Defenses.

The United States and the State of Minnesota have set out more detailed introductory statements of this action in the documents filed in support of the second and third motions listed above and, for the sake of brevity, do not repeat those introductory statements here.

The second motion listed above is unlike the motion supported herein in that this motion is based entirely on procedural grounds while the second motion is based not on procedural issues but on the substantive argument that Reilly Tar has no right to a jury trial on the claims raised by the United States.

pleadings and orders were served in this action; (2) the dates by which the federal rules of civil procedure actually required those pleadings to be served; and, (3) the computation of the number of days between the service of the demand for a jury trial and "the service of the last pleading directed to" the issues on which Reilly Tar has demanded a jury trial.

These facts are fully set out in the chronology on the following page and, in the argument which follows, are shown to support this motion for an order denying Reilly Tar's demand for a jury trial as untimely under Fed. R. Civ. P. 38(b).

**CHRONOLOGY OF FACTS**

<b>September 4, 1980</b>	<b>United States serves its Summons and Complaint against all five Defendants named in this matter</b>
<b>September 16, 1980</b>	<b>State of Minnesota files its Motion to intervene with supporting papers, including its Complaint in Intervention</b>
<b>September 23, 1980</b>	<b>City of St. Louis Park files its Motion to intervene with supporting papers, including its Complaint in Intervention</b>
<b>October 15, 1980</b>	<b>State's and St. Louis Park's Motions to Intervene are granted</b>
<b>November 17, 1980</b>	<b>Parties stipulate to the extension of time (until December 19, 1980) for Reilly to answer the complaints, to move or to otherwise plead</b>
<b>December 23, 1980</b>	<b>Reilly files its motion to dismiss</b>
<b>May 20, 1981</b>	<b>City of Hopkins files its Motion to intervene with supporting papers, including its Complaint in Intervention</b>
<b>May 27, 1981</b>	<b>State serves its Amended Complaints</b>
<b>June 15, 1981</b>	<b>Hopkins' motion to intervene is granted</b>
<b>August 28, 1981</b>	<b>St. Louis Park serves its Amended Complaint</b>
<b>September 11, 1981</b>	<b>United States serves its First Amended Complaint</b>
<b>September 25, 1981</b>	<b>Court issues Order permitting the filing of the Amended Complaints</b>
<b>October 6, 1981</b>	<b>Hopkins files its Amended Complaint</b>
<b>November 15, 1981</b>	<b>Court issues Order permitting the filing of Hopkins' Amended Complaint</b>
<b>January 15, 1982</b>	<b>Court hears Motion for Dismissal</b>
<b>August 20, 1982</b>	<b>Court issues Order denying Motion for Dismissal</b>
<b>* August 23, 1982</b>	<b>Order of the Court is filed and the Clerk serves notice on the parties</b>
<b><u>September 7, 1982</u></b>	<b>LAST DAY REILLY SHOULD HAVE SERVED ITS ANSWERS TO ALL FOUR COMPLAINTS</b>
<b>September 17, 1982</b>	<b>Reilly serves its Answer to the Complaints filed by the United States, the State and St. Louis Park</b>
<b><u>September 17, 1982</u></b>	<b>LAST DAY REILLY SHOULD HAVE DEMANDED A JURY TRIAL</b>
<b>September 22, 1982</b>	<b>Reilly serves its Answer to the Complaint filed by Hopkins</b>
<b>October 1, 1982</b>	<b>Reilly serves its demand for a jury trial</b>

---

\* This is the event that triggers the running of the time periods established in Fed. R. Civ. P. 12(a) and, ultimately, Fed. R. Civ. P. 38(b)

### III. ISSUE

Parties who fail to demand a jury trial within the time established in Fed. R. Civ. P. 38(b) waive their right to automatically demand such a trial. Fed. R. Civ. P. 38(d). The cut-off date by which parties must bring a demand under Fed. R. Civ. P. 38(b) is "ten days after the service of the last pleading directed to" the issues on which the jury trial is demanded.

The issue raised herein is the following: Is a right to demand a jury trial under Fed. R. Civ. P. 38(b) waived when the party demanding the jury trial (1) failed to serve any of the four Answers it was required to make within the time established by Fed. R. Civ. P. 12(a); (2) failed to include a demand for a jury trial within any of its four Answers; (3) only sought a jury trial fifteen days after service of three of its untimely-served Answers and nine days after service of the most tardy of the four Answers; and, (4) ultimately served its demand for a jury trial a full three weeks after the date that it would have been required to make that demand had it met the time limitations established by Fed. R. Civ. P. 12(a) and 38(b)?

### II. ARGUMENT

- A. Fed. R. Civ. P. 38(b) establishes strict time limitations within which demands for jury trial may be made as of right. Failure to meet these limitations results in waiver of the right.

The Federal Rules of Civil Procedure establish two rules through which a party may secure a trial by jury: The first of

these two rules, Fed. R. Civ. P. 38, sets out the procedures, including a specific deadline, for demanding a jury trial as of right. A party who fails to follow these procedures automatically waives whatever right it may have had to demand a jury trial. Fed. R. Civ. P. 38(d). Once the right is waived, a party may only secure a jury trial by moving the court, under Fed. R. Civ. P. 39(b), to exercise its discretion to order a trial by jury. 5 J. Moore, Moore's Federal Practice ¶ 38.39[1] (2nd ed. 1982).

The deadline established in Fed. R. Civ. P. 38(b) for demanding a jury trial as of right is set out as follows:

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time within 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

In determining whether Reilly Tar's demand for a jury trial in this matter was served in a timely fashion, it is therefore necessary to identify the "last pleading directed to" the issues on which Reilly Tar has demanded a jury trial.

B. As to those issues for which Reilly's Answers to the United States and the State constitute the last pleadings, Reilly Tar's demand for a jury trial is without question beyond the deadline established in Fed. R. Civ. P. 38(b).

There are a number of issues addressed in the Complaint of the United States or the State which are not also addressed in the Hopkins Complaint. For instance, the United States raises issues involving injunctive relief under § 106 of the "Superfund Act," 42 U.S.C. § 9606, and the State of Minnesota raises issues

involving duties to recover materials that may pollute under Minn. Stat. § 115.061 (1982). Hopkins raises neither of these.

For these issues, the "last pleadings" under Fed. R. Civ. P. 38(b) are Reilly Tar's Answers to the United States and the State. Spiro v. Pennsylvania R. Co. et al., 3 F.R.D. 351, 352 (S.D.N.Y. 1942). The timeliness of Reilly Tar's demand for a jury trial on these issues must therefore be measured against the date Reilly Tar served its Answers to the United States and the State.

Reilly Tar served its Answers to the United States and the State on September 17, 1982. (Under Fed. R. Civ. P. 12(a), these Answers actually should have been served no later than September 7, 1982.) Reilly Tar served its demand for a jury trial on October 1, 1982.

Even ignoring the fact that Reilly Tar served its Answers a full ten days later than Fed. R. Civ. P. 12(a) permits, it is plain that Reilly Tar's demand for a jury trial is untimely. October 1 is more than fifteen days after September 17. This Court is compelled to reject as untimely under Fed. R. Civ. P. 38(b) Reilly Tar's demand for a jury trial on all those issues for which Reilly Tar's Answers to the United States and the State constitute the "last pleadings." 2/

---

2/ It is not necessary for this Court to decide at this time the extent to which issues addressed in the Hopkins' Answer overlap with issues addressed in the Answers to the United States or the State. These issues will be refined and clarified as trial approaches and can be properly categorized at that time.

- C. Reilly Tar cannot use the lateness with which it filed its Answer to Hopkins to extend the deadline by which it would have been required to make a demand for a jury trial under Fed. R. Civ. P. 38(b).

There are a number of issues which are raised in the Hopkins Complaint as well as the Complaints of the United States and the State of Minnesota. For these issues, the Hopkins Answer is arguably the "last pleading" within the meaning of Fed. R. Civ. P. 38(b). Spiro v. Pennsylvania R. Co. et al., 3 F.R.D. 351, 352 (S.D.N.Y. 1942).

Even as to these issues, Reilly Tar has waived its right to to demand a jury trial under Fed. R. Civ. P. 38(b). This waiver is the consequence of Reilly Tar's failure to meet the deadlines set out in Fed. R. Civ. P. 12(a). That is, Reilly Tar did serve its demand for a jury trial within ten days after it served its Answer to the Complaint of Hopkins, but it accomplished this only by having failed to serve its Answer to the Hopkins Complaint on time.

To have complied with the deadlines established by Fed. R. Civ. P. 12 (a), Reilly should have served its Answers to the Complaints of the United States, the State, St. Louis Park and Hopkins no later than September 7, 1982. Instead, Reilly served the first three Answers on September 17, 1982, and its Answer to Hopkins on September 22, 1982. No demand for a jury trial appeared in any of the Answers. No order extending the time to answer was ever granted to or even requested by Reilly Tar.



The only reason Reilly Tar's demand for a jury trial is within ten days after its service of its Answer to Hopkins is that Reilly was even more dilatory in serving its Answer to Hopkins than it was in answering the other three plaintiffs. If a party were allowed to use its disregard of one of the deadlines of the Federal Rules of Civil Procedure as a springboard to disregard further deadlines established by the rules, litigants would be encouraged to ignore deadlines until defaults or other sanctions were affirmatively brought against them. Public policy opposes such a development and could be best served by reasonably but firmly applying the deadlines of the Rules as they were written. Reilly Tar should not be permitted to use the lateness with which it served its Hopkins Answer to extend the deadlines that would have applied for a timely answer.

#### IV. CONCLUSION

Twice, Reilly Tar failed to meet the deadlines established in the Federal Rules of Civil Procedure. First, it failed to serve its Answers within the deadlines established by Fed. R. Civ. P. 12(a). Second, it failed to serve its demand for a jury trial within ten days after it should have served its Answers or even within ten days after it served most of its late Answers. In fact, Reilly Tar only served its demand for a jury trial within ten days after service of the most tardy of the four Answers it was required to serve.

These several failures of Reilly Tar have resulted in its having waived whatever right it may have had to demand a jury trial under Fed. R. Civ. P. 38(b). As a result of these failures, Reilly Tar's demand for a jury trial must be rejected as untimely.

Respectfully submitted,

JAMES M. ROSENBAUM  
United States Attorney  
234 U.S. Courthouse  
110 South 4th Street  
Minneapolis, MN 55401

By: \_\_\_\_\_

Mary L. Egan  
Assistant United  
States Attorney

David Hird  
Attorney, Environmental  
Enforcement Section  
Land and Natural Resources  
Division  
U.S. Department of Justice  
10th Street & Pennsylvania  
Avenue, N.W.  
Washington, D.C. 20530

Robert E. Leinginger  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency  
Region V  
230 South Dearborn Street  
Chicago, Illinois 60604

HUBERT H. HUMPHREY, III  
Attorney General

Paul Zerby  
Minnesota Department of Health  
136 University Park Plaza Bldg.  
2829 University Avenue S.E.  
Minneapolis, MN 55414

By:   
Dennis Coyne

And:   
Stephen Shakman

And:   
Lisa Tiegel

Special Assistant  
Attorneys General

Minnesota Pollution Control Agency  
1935 W. County Road B-2  
Roseville, MN 55113  
(612) 296-7342

DATED: April 20, 1983